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June 12, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

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JUN 12 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and five copies of its Comments in MM Docket No. 95-40.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,

Roger Goodspeed

RG/ak
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Part 73 of the) MM Docket No. 95-40
Commission's Rules concerning the)
Filing of Television Network)
Affiliation Contracts)

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COMMENTS OF CAPITAL CITIES/ABC, INC.

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Commission's Rules concerning the)
Filing of Television Network)
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To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Comments in response to the Notice of Proposed Rule Making in the above-entitled proceeding ("Notice").¹ In the Notice, the Commission proposes eliminating or amending the current requirement that television broadcast licensees file any contracts with "national networks."² Specifically, the Commission proposes three alternatives to the current rule: eliminate the filing requirement and require stations to produce their network affiliation contracts to the Commission upon request; continue to require filing of network contracts but eliminate public access; or continue filing and public access, but allow redaction of compensation and other

¹ MM Docket No. 95-40, Notice of Proposed Rule Making, FCC 95-145 (released April 5, 1995).

² 47 C.F.R. 73.3613(a). The rule requires licensees to file affiliation agreements, renewals or amendments, and notice of termination of any filed agreement.

"business sensitive terms."³

Capital Cities/ABC supports the first alternative. The Commission can adequately enforce stations' and networks' compliance with the network/affiliate rules by requiring production of affiliation agreements when legitimate questions are raised about their terms. The current scheme of compulsory public filing does nothing to enhance Commission enforcement while imposing on licensees undue burdens of paperwork and anticompetitive effects.

In 1969, when the Commission enacted the public-filing requirement for network affiliation contracts, it based its decision on two rationales, neither of which can withstand careful analysis, particularly under current competitive conditions. The first rationale was that the public disclosure requirement would enhance competition by correcting perceived market imbalances created by multiple station owners' superior bargaining positions (compared to non-group owners) in negotiating with the traditional networks.⁴ The second rationale was that the public interest would be served

³ Notice, pars. 17-19.

⁴ Report and Order, Docket No. 14710, 15 RR 2d 1579, par. 12 and n. 9 (1969) ("1969 Order"). See also Notice, par. 5. In the 1969 Order the Commission considered only the potential effects of public filing on each network's contract negotiations with its affiliates, and gave no notice to the potential anticompetitive effects of public filing on competition among networks for affiliates. The Commission recognizes that there is now substantial competition for affiliates in the various markets among the networks. Notice, par. 11.

if information about network station affiliation agreements was made publicly available.⁵

The first of the rationales the Commission relied upon in 1969 appears to be based on the mistaken notion that affiliates in different markets compete with one another in negotiating network affiliation contracts. In fact, since each network typically affiliates with one exclusive station in each market, access to compensation information about other markets would not benefit competition. To the contrary, as most commenters said in 1969, public filing risks causing competitive injury by disclosing confidential compensation and operational information.⁶ To the extent the Commission's 1969 rationale was based on general concerns about network bargaining power, those concerns pale under current competitive conditions. The success of the Fox network and the emergence of the UPN and Warner Brothers networks has caused a decided shift in bargaining power in favor of affiliates. Absent network "market power" over affiliates, which does not exist, there is no reason why individual market negotiations between networks and affiliates should be encumbered by a public disclosure requirement.

The "public interest" reason cited by the Commission in support of its 1969 decision is equally lacking in justification. Public monitoring of a station's public

⁵ 1969 Order, pars. 12-13.

⁶ 1969 Order, par. 9. See also Notice, par. 4.

interest performance is based primarily on what the station broadcasts, not on the terms of its program supply contracts. If it were deemed advisable that network contracts be disclosed to aid the public in monitoring station performance, the same reasoning would apply to all program-related contracts, including syndication contracts and major talent agreements. Such a requirement would harm competition by exposing to competitors confidential, proprietary business information. At the same time, it would not serve its intended purpose because information from program supply contracts is not essential to evaluation of a station's on-air performance.

In the Notice the Commission no longer relies on either of the two 1969 rationales as a basis for continuing regulation. Instead, it identifies the "primary purpose" of requiring public filing of affiliation agreements: to "give the Commission the ability to monitor those contractual relationships and ensure that the Commission's restrictions on those relationships are not violated in affiliation agreements."⁷

In evaluating the costs of public filing, the Commission properly notes that "[b]y making compensation or other data in these filings publicly available, the Commission may facilitate the ability of parties either seeking or offering

⁷ Notice, par. 9.

affiliation to avoid competition."⁸ As the Commission states, the public filing requirement discourages networks from designing affiliation agreements to meet special market needs -- for fear other affiliates not similarly situated may demand the same treatment -- and so makes "it less likely that the terms are tailored to best suit the needs of the parties to the contract."⁹

Capital Cities/ABC agrees with the Commission's tentative conclusion that it can properly enforce the network/affiliate rules without requiring filing of affiliation contracts. Since those rules are directed to protecting licensee programming discretion, network-affiliated stations and their representative organizations can be relied upon to initiate complaints concerning potential rule violations. In our view, the paperwork and anticompetitive costs imposed on stations and networks by the public-filing requirement are unjustified by any enforcement benefits. We propose, accordingly, that the Commission eliminate the filing requirement and require that stations make their affiliation agreements available to

⁸ Notice, par. 15.

⁹ Notice, par. 16 (footnote omitted). Although the Commission previously concluded in the 1969 Order that "public filing of these contracts enables weaker affiliates to attempt to ensure that they receive comparable or competitive compensation to other affiliates of a network," id., that conclusion, even if true in 1969, is no longer true now in the face of aggressive competition by more networks for affiliates in the various markets.

the Commission upon request.¹⁰

Respectfully submitted,

By: 

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June 12, 1995

¹⁰ Were the Commission to decide to adopt its second proposal, requiring filing of affiliation agreements but eliminating public access to the filings, Notice, par. 18, we believe such filings would be subject to the confidential commercial information exemption under the Freedom of Information Act, 5 U.S.C. Section 552(b)(4). See Allnet Communication Services, Inc. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) (information required to be submitted to FCC by telecommunications companies is within exemption).